

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Sprint PCS and AT&T	)	WT Docket No. 01-316
File Petitions for Declaratory Ruling	)	
On CMRS Access Charge Issues	)	

**COMMENTS OF NEXTEL COMMUNICATIONS, INC.**

Nextel Communications, Inc. (“Nextel”), by its attorneys, hereby submits these comments in response to the above-captioned proceeding.<sup>1</sup> The Federal Communications Commission (“Commission”), seeks comment concerning a single issue: whether current Commission regulations and policy permit a commercial mobile radio services (“CMRS”) provider to recover termination access charges from an interexchange carrier (“IXC”). This question is raised in the context of a long-standing legal dispute between Sprint Spectrum, d/b/a Sprint PCS (“Sprint PCS”) and AT&T Corp. (“AT&T”) and comes to the Commission pursuant to a judicial referral under the doctrine of primary jurisdiction.<sup>2</sup> Sprint PCS seeks Commission support for its legal claim that AT&T should pay some form of access fee to Sprint PCS to terminate calls on the Sprint PCS network.

The law appears plain: there is no federal law or policy that prevents Sprint PCS from recovering its call termination costs from AT&T. As Sprint PCS points out, Sprint PCS has a local network that can and does originate and terminate interexchange calls for carriers such as

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<sup>1</sup> Sprint PCS and AT&T File Petitions for Declaratory Ruling On CMRS Access Charge Issues, *Public Notice*, DA 01-2618, WT Docket No. 01-316 (rel. Nov. 8, 2001).

<sup>2</sup> See *Sprint Spectrum L.P. v. AT&T Corp.*, Civil Action No. 00-00973-W-5 (W.D. Mo. July 24, 2001).

AT&T. Any refusal to pay for this access function when the same function, when provided by a wireline carrier, is compensated, raises unreasonable discrimination concerns under Section 202(a) of the Communications Act. If AT&T and Sprint PCS do not have other commercial compensation arrangements, it seems obvious that AT&T should treat Sprint PCS in the same way it treats wireline carriers with respect to access charges.

Accordingly, the Commission must respond to the court's request by confirming in a declaratory ruling that Sprint PCS's legal claims against AT&T can go forward in federal court and that CMRS providers have the same right as wireline local exchange carriers to request access charge termination fees from IXC's. In the absence of a voluntary compensation arrangement, AT&T should compensate Sprint PCS for the service Sprint PCS provides to AT&T's customers.

**I. THERE IS NO LONGSTANDING TRADITION OF BILL AND KEEP IN THE CMRS INDUSTRY THAT SHOULD DICTATE THE OUTCOME OF THE SPRINT PCS – AT&T DISPUTE.**

AT&T argues that Sprint PCS is ignoring a longstanding tradition of a "bill and keep" arrangement for CMRS carrier termination of IXC traffic.<sup>3</sup> AT&T states that prior to 1998, no CMRS carrier requested access charges from IXC's, and notes that several major wireless carriers, including Nextel, still do not request termination access fees from IXC's today.<sup>4</sup> Nextel acknowledges that it has not formally requested access charge termination fees from IXC's thus far, but asserts that Nextel's past practices, and the past practices of other CMRS carriers, have no bearing on the legal issue of whether CMRS carriers have the right to request access charges from IXC's for inter-MTA origination and termination of traffic.

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<sup>3</sup> AT&T Petition for Declaratory Ruling at 2.

<sup>4</sup> AT&T Petition for Declaratory Ruling at 13.

As an initial matter, the Commission should recall that wireless use has skyrocketed in the past few years because the institution of new business models under which consumers are sold baskets of minutes has changed the way consumers use their wireless phones. Accordingly, consumers are much more willing today to leave their wireless phones on and available to receive incoming calls, including long distance calls, than they were in the past. These changing consumer usage patterns have presented CMRS carriers with reasons they may not have had before to pursue the collection of access charges from IXC's to reflect the usage of wireless networks by interexchange customers. While some, such as Nextel, have thus far made the business decision to structure their relationships with IXC's in other ways, those business decisions should not preclude other CMRS carriers, such as Sprint PCS, from pursuing their legal rights.

Further, because CMRS carriers have always faced competition and do not file either state or federal tariffs, as a practical matter they have not had access to any established regulatory framework for collecting the charges they are legally entitled to. Many CMRS carriers, therefore, may have determined that it is not worth the time and trouble to try to collect access charges from IXC's and, indeed, Sprint PCS's three year experience with AT&T proves this point. That CMRS carriers have not tried to collect access fees from IXC's does not, however, show that there is a tradition of bill and keep governing this traffic as AT&T claims. Rather, it merely shows that in the past the limited amount of expected revenue to CMRS carriers from IXC access charges, combined with the asymmetrical market power between the CMRS and IXC industries, has kept most CMRS carriers from pressing their legal claims.

The Commission has established a framework for the exchange of intra-MTA traffic and is examining whether bill and keep might be an appropriate default when local carriers cannot

agree on compensation for the reciprocal transport and termination of traffic on their respective networks.<sup>5</sup> Nextel has stated that in relationships where there are reciprocal termination responsibilities, a bill and keep default compensation scheme can effectively address unequal bargaining power.<sup>6</sup> A bill and keep compensation framework is not appropriate, however, where there is no reciprocity in the functions and capabilities interconnecting carriers provide to one another. As IXC's do not provide a termination service to CMRS providers, a presumption that bill and keep is the appropriate regulatory default where CMRS providers and IXC's cannot agree on alternative arrangements is flawed. The Commission should, therefore, take this occasion to confirm that CMRS carriers are free to exercise reasonable business judgment as to the terms of interconnection to their networks for inter-MTA access traffic and that CMRS carriers may ask for, and receive, access fees from IXC's.

**II. IN THE ABSENCE OF AN ALTERNATIVE AGREEMENT, COMPETITIVE NEUTRALITY UNDER THE COMMUNICATIONS ACT ALLOWS CMRS CARRIERS TO REQUEST ACCESS FEES FROM IXCS.**

CMRS carriers are local carriers with distinct network costs, including costs that cannot always easily be recovered from end users generally. The Commission has been encouraging CMRS carriers to become competitive alternatives to wireline local service, and CMRS carriers are increasingly sensitive to billing their customers for transactions where they are not the cost-causers, such as when they receive calls from AT&T's long-distance network. The competitive,

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<sup>5</sup> See Developing a Unified Inter-carrier Compensation Regime, *Notice of Proposed Rulemaking*, CC Docket No. 01-192, FCC 01-132 (rel. April 27, 2001) ("*Inter-carrier Compensation Notice*").

<sup>6</sup> See, e.g., Comments of Nextel Communications, Inc., *Inter-carrier Compensation Notice* at 17-31 (filed Aug. 21, 2001); Reply Comments of Nextel Communications, Inc., *Inter-carrier Compensation Notice* at 2 (filed Nov. 5, 2001).

deregulatory nature of the CMRS industry encourages and allows CMRS carriers to enter into creative business arrangements with non-dominant carriers such as IXCs. However, Nextel agrees with Sprint PCS that the Commission has never precluded the use of access charges to recover CMRS carrier costs of interexchange carrier call termination in the absence of alternative, voluntary agreements.

In an attempt to browbeat the Commission into finding in its favor, AT&T states that if the Commission allows CMRS carriers to collect access charges from IXCs, extensive state and federal regulation would be required.<sup>7</sup> To the contrary, no regulation would be necessary. As Sprint PCS states, the Commission already has the authority to determine whether the rates that Sprint PCS, or any other CMRS carrier, charges for IXC access are too high and, as a result, unjust and unreasonable under Section 201(b) of the Communications Act.<sup>8</sup> All AT&T need do if it in fact believes that Sprint PCS's charges are too high, is file a complaint under Section 208 of the Communications Act and the Commission will be able to investigate the dispute. The Commission also has other tools, such as a rulemaking, if it believes there is any reason to establish parameters for CMRS access. However, unless and until there is evidence of CMRS abuse in this area, any regulation would be premature. The Commission should, therefore, decline AT&T's invitation to regulate in this area through the imposition of needless, and perhaps harmful, requirements. Instead, if an IXC believes that a CMRS carrier's access fees are too high, adequate recourse is already available through the Commission's normal processes.

Just as the Commission, under its mandate from Congress in the Omnibus Budget Reconciliation Act of 1993 and the Telecommunications Act of 1996, addressed the superior

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<sup>7</sup> AT&T Petition for Declaratory Ruling at 20-27.

<sup>8</sup> Sprint PCS Petition for Declaratory Ruling at 7, n.20.

market power of incumbent local exchange carriers (“ILECs”) by legally recognizing the CMRS industry’s right to recover ILEC-caused termination costs,<sup>9</sup> similarly the Commission must promote competition by acknowledging the right of CMRS carriers to recover termination costs caused by IXCs. CMRS customers should not be forced to unfairly subsidize IXCs who already, as Sprint PCS points out, have termination costs imbedded in their rates.<sup>10</sup> Indeed, no IXC customer rate plan that Nextel has seen gives customers discounts when they make a long-distance call to a wireless, as opposed to a wireline, telephone. Competitive neutrality as between wireless and wireline carriers thus demands that CMRS carriers have the same rights to recover IXC-caused termination costs as their wireline competitors. While the Telecommunications Act of 1996 encourages voluntary arrangements for carrier-to-carrier compensation, in the absence of a voluntary arrangement the Commission has already determined that IXC traffic termination costs can be recovered by the use of access fees. CMRS carriers, therefore, should, in the absence of alternative voluntary arrangements, be permitted to collect access fees from IXCs.

### **III. A DECLARATORY RULING SHOULD ISSUE IN FAVOR OF SPRINT PCS.**

Sprint PCS has been attempting to exercise its legal rights and collect its termination costs from AT&T since 1998. AT&T has improperly attempted to shield itself by creating a non-existent tradition in the wireless industry as a reason to refuse to pay Sprint PCS. Nextel does not disagree that the prevailing industry practice among CMRS providers is that they do not

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<sup>9</sup> See Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, *First Report and Order*, 11 FCC Rcd 15499, 15517 (1996), *aff’d Iowa Utils. Bd. v. FCC*, 135 F.3d 535 (U.S. App. 8th Cir. 1998), *aff’d AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (subsequent history omitted).

<sup>10</sup> Sprint PCS Petition for Declaratory Ruling at 10.

assess access charges on IXCs. This practice, however, does not trump the fact that Sprint PCS has a legal right to request access fees from AT&T if it has not established an alternative compensation arrangement. The Commission should, therefore, acknowledge the legal rights of CMRS providers and promptly issue a declaratory ruling in favor of Sprint PCS.

Respectfully submitted,

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